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No. 93-356

In The Supreme Court of the United States

October Term, 1993

MCI Telecommunications Corporation,
Petitioner,

v.

American Telephone & Telegraph Company,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER MCI TELECOMMUNICATIONS CORPORATION

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QUESTION PRESENTED

Whether Section 203(b)(2) of the Communications Act, which authorizes the Federal Communications Commission to "modify any requirement" of Section 203, permits the Commission to make Section 203's tariff-filing requirement optional for telephone companies that lack market power.

PARTIES TO THE PROCEEDING

The petitioner in this case is MCI Telecommunications Corporation. The petitioners in No. 93-521 are the United States of America and the Federal Communications Commission.

The respondent is the American Telephone and Telegraph Company. Other intervenors in the court of appeals were the IBM Corporation, the United States Telephone Association, Pacific Bell and Nevada Bell, the Association for Local Telecommunications Services, the Cellular Telecommunications Industry Association, US Sprint Communications Company, the Competitive Telecommunications Association, the Bell Atlantic Telephone Companies, Local Area Telecommunications, Inc., the Ad Hoc Telecommunications Users Committee, Mobile Marine Radio, and the Southwestern Bell Corporation.

RULE 29.1 STATEMENT

See Petition for Certiorari at ii.

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BRIEF FOR PETITIONER MCI TELECOMMUNICATIONS CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported, and is reprinted at pages 1a-2a of the appendix to the petition for certiorari ("Pet. App."). The opinion invalidated a rulemaking order of the Federal Communications Commission. The Commission's rulemaking order is reported at 7 FCC Rcd. 8072 (1992), and is reprinted at Pet. App. 3a-36a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 4, 1993. The jurisdiction of this Court to review the judgment

of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

See Petition for Certiorari at 2-3.

STATEMENT OF THE CASE

At issue in this case is the scope of the Federal Communications Commission's authority to modify tariff filing requirements under Section 203 of the Communications Act of 1934, 47 U.S.C. § 203. Section 203(a) states that telephone companies shall file tariff schedules with the Commission listing the interstate services they offer and the rates for those services. Section 203(b)(2) expressly delegates to the Commission the power to "modify any requirement made by . . . this section either in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2). Section 203(c) prohibits untariffed service "unless otherwise provided by or under the authority of this chapter." 47 U.S.C. § 203(c).

Invoking the authority conferred by Section 203(b)(2), the FCC modified Section 203's tariff requirements in a series of "permissive detariffing" rulemaking orders in the 1980s. Those orders made tariff filing optional for emergent "nondominant" long distance carriers such as MCI (*i.e.*, those lacking market power).[1] The Commission premised this modification on the policy judgment that "traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing."[2] Recently, after a decade of successful results, the Commission reaffirmed its permissive detariffing policy for nondominant carirers in a rulemaking order released on November 25, 1992 ("*November 25th Report and Order*").[3]

[1] *See First Report and Order*, 85 F.C.C.2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981); *Second Report and Order*, 91 F.C.C.2d 59 (1982); *Third Report and Order*, 48 Fed. Reg. 46,791 (Oct. 14, 1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983).

The D.C. Circuit, relying on decisions which predated the *November 25th Report and Order*, summarily reversed the Commission. In so doing, the court of appeals necessarily failed to consider the FCC's views in the *November 25th Report and Order* on the meaning of Section 203(b)(2) and the wisdom of the permissive detariffing policy. MCI (and the United States in No. 93-521) seek reversal of that decision.

1. Traditional Tariff Regulation of Communications Common Carriers Under the 1934 Act.

When Congress passed the Communications Act in 1934, AT&T's ownership of the vertically integrated Bell System afforded it a monopoly over telephone service in the United States. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("[t]his vast monopoly which so immediately serves the needs of the people in their daily lives must be effectively regulated").[4] Title II of the Act,

[2] *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd. 8072, 8073 (1992); Pet. App. 3a, 6a.

[3] *Id.* at 5a.

[4] As the FCC said in one of its first major investigations of the telephone industry after the passage of the Communications Act of 1934, the "Bell System has achieved its dominant position in the telephone communications field through the prevention and elimination of effective competition." *Investigation of the Telephone Industry in the United States*, H.R. Doc. No. 340, 76th Cong., 1st Sess. 146 (1939); *see also id.* at 133-46 (describing "Bell System Attempts to Eliminate Competition").

Other communications services were also dominated by a small number of firms. *See Further Notice of Proposed Rulemaking*, 84

which regulates communications providers, was the product of Congress's concerns about monopoly control of these essential services.

In general, "Title II represents the traditional approach to public utility regulation." *See Further Notice of Proposed Rulemaking,* 84 F.C.C.2d 445, 457 (1981).[5] When customers can turn only to a single entity for service, market forces do not operate to preclude that entity from charging unreasonably high or discriminatory rates, or from engaging in predatory pricing to deter prospective competitors. Government must therefore regulate prices to protect consumers. *See Second Report and Order,* 91 F.C.C.2d 59, 60 (1982) ("Title II regulatory scheme was intended to constrain the exercise of substantial market power").

Section 203 of the Act is a typical component of traditional "public utility" regulation. Tariffs provide regulators with ready access to price information, and thereby facilitate affirmative government supervision of the rates charged consumers. Section 203 thus functions in an ancillary capacity; it supports the Commission's ability to enforce the substantive mandates of Title II under monopoly conditions, but is not itself intrinsically beneficial.

So long as monopoly conditions prevailed throughout the market, Section 203's ancillary tariff requirements were fully consistent with the Communications Act's core objectives of ensuring economical and efficient telephone service. 47 U.S.C. § 151. Though tariffing imposed substantial administrative costs on both the regulated common carriers and the Commission, the Commission

F.C.C.2d at 459-60 (setting forth evidence of industry concentration considered by the 1934 Congress).

[5] *See also* 84 F.C.C.2d at 448-49. *See generally* Kahn, *The Economics of Regulation,* Vol. I, Ch. 1 (1971).

judged that those costs were more than offset by the protection from unreasonable or discriminatory pricing afforded consumers. *See Further Notice of Proposed Rulemaking,* 84 F.C.C.2d at 478 ("In a regulated environment imposed to constrain market power, such requirements had evolved to protect the consumer from supranormal or discriminatory pricing."). During the "relative constancy [in] the telecommunications industry between 1934 and the 1970's," therefore, the Commission had no reason to exercise its power under Section 203(b)(2) to modify Section 203's tariff filing requirement.[6]

2. Development and Impact of the Permissive Detariffing Rule For Nondominant Carriers.

In the 1970s, advances in technology reduced the investment required to enter the market, and FCC decisions authorized competition in certain services. As a result, competitors emerged to challenge the Bell System for the first time. The Commission noted in 1981 that:

> [t]he present communications marketplace is quite different than the one in 1934. New technologies and public needs have in recent years spawned a variety of communications services, often provided by new entrants into the communications marketplace. A number of these firms offer innovative or specially designed services and facilities to a relatively small number of business customers. Many own few or no facilities of their own, but utilize the basic transmission services of other carriers. Almost all are subject to vigorous competition among themselves or with established carriers. An even greater number of entrants and new services seem certain to emerge in years to come. Thus, the future communications marketplace also promises to be quite different in many ways from that in 1934.[7]

[6] *Further Notice of Proposed Rulemaking,* 84 F.C.C.2d at 446.

[7] 84 F.C.C.2d at 446.

The Commission understood that these profound changes called for a reassessment of traditional regulatory policies. Consistent with its mandate to further the public interest in reliable and efficient communications service, the Commision sought "to reconcile the use of traditional regulatory tools . . . with the characteristics of the firms operating in the communications arena." *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 455. The Commission believed that market incentives would discipline firms lacking market power, and thus made mandatory tariffs unnecessary to prevent unreasonable or discriminatory pricing by such firms. The Commission further concluded that imposing a tariff requirement on market-disciplined firms would dampen competition. The Commission was concerned that administrative requirements alone would impose substantial costs on potential or recent market entrants. Furthermore, advance publication of prices and other terms and conditions might artificially stabilize prices at supracompetitive levels. *Id.* at 478. *See generally United States v. Container Corp. of America*, 393 U.S. 333 (1969). More generally, the Commission found, tariff requirements would impede the ability of competitive firms to "price and diversify their services" in response to rapid market fluctuations, 84 F.C.C.2d at 455, and thus threatened to undermine the dynamism of the emerging competitive long distance market. *Id.* at 456.

The FCC found, therefore, that in a competitive market a universal tariff requirement no longer advanced the overall goals of the Communications Act. *See Second Report and Order*, 91 F.C.C.2d at 65 ("traditional tariff regulation of non-dominant carriers is at odds with the purposes of the Act because it inhibits price competition, service innovation and the ability of firms to respond quickly to market trends"). Because tariffs have no intrinsic value apart from their role in facilitating regulation of monopoly pricing practices, there was simply no reason

to continue to impose the substantial costs tariffs entail. *See Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 483 ("the provision for filing tariffs was included as a means of insuring that carriers not discriminate; it was not an end in itself").

As the Commission noted in 1980, so long as regulation imposes costs on firms, not justified by the benefits thereof, the services provided by those firms "can never be as 'efficient' nor can the charges be as 'reasonable' as they might be in the absence of such artificial costs." *First Report and Order*, 85 F.C.C.2d 1, 13 (1980). To the extent the Act permitted the Commission to modify tariff requirements, therefore, modification would plainly be "consistent with, and perhaps mandated by, the express objectives of the Act to assure widely available, efficiently produced, and reasonably priced communications service." *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 448.

The FCC commenced a rulemaking in 1979, called the *Competitive Carrier* proceeding, to consider how regulation should evolve in this new environment. In its *First Report and Order*, the Commission took a first step in the direction of deregulation. It determined that the tariffing requirements of Section 203 should apply more stringently to dominant carriers with market power than to nondominant carriers.[8]

In a *Further Notice of Proposed Rulemaking* in 1981, the FCC concluded that for nondominant carriers, the tariff filing requirement "has worked the perverse effect of imposing a measure which (1) is superfluous as a con-

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[8] In particular, the FCC concluded that market power allowed dominant carriers to set unreasonable or discriminatory prices contrary to the dictates of Sections 201 and 202 of the Communications Act, while nondominant carriers were constrained by the market and thus could not set such illegal prices. 85 F.C.C.2d at 20-21.

sumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." 84 F.C.C.2d at 478-79. Concluding that "the effects of applying the tariff requirements of Section 203 to non-dominant carriers frustrate the underlying purposes of the Act," the Commission proposed that these requirements be gradually modified to apply only when carriers had market power. *Id.* at 478.[9]

To implement this policy, the Commission followed a "step-by-step approach through which [it] gained experience with selectively lessening regulatory burdens." [10] The Commission initially made tariffing optional for certain limited classes of nondominant carriers,[11] "for which [the FCC was] confident that tariff filings were not necessary to promote [the Commission's] statutory goals." [12]

In its *Fourth Report and Order*, 95 F.C.C.2d 554 (1983), the Commission extended permissive detariffing

[9] *See also Second Report and Order*, 91 F.C.C.2d 59, 60-61 (1982) (tariffs for nondominant carriers are "counterproductive to the advancement of the Act's express objectives as set forth in Section 1").

The FCC expressly "under[took] a careful examination of the nature of its authority under Title II of the Communications Act of 1934," 84 F.C.C.2d at 446, and concluded that it could remove tariff obligations on firms that lack market power, pursuant to the FCC's power under Section 203(b) to "modify any requirement . . . of this section." *Id.* at 479-80.

[10] *Fifth Report and Order*, 49 Fed. Reg. 34,824, 34,824 (Sept. 4, 1984).

[11] The FCC first extended the permissive detariffing rules to resellers of domestic services, *see Second Report and Order*, 91 F.C.C. 2d 59 (1982), and shortly thereafter to resellers operating on domestic off-shore points, *see Third Report and Order*, 48 Fed. Reg. 46,791 (Oct. 14, 1983).

[12] *Fifth Report and Order*, 49 Fed. Reg. at 34,824.

to a broader group of nondominant carriers, including MCI. Based upon its experience of reviewing tariffs from such carriers, the Commission found "no evidence that it is in the public interest for us to continue receiving . . . [these tariff] filings," and no evidence that tariffs were required to prevent nondominant carriers "from charging unjust or unreasonable rates or making service unavailable." *Id.* at 578 & n.79. The FCC further noted that "[i]t is costly for carriers to prepare tariff . . . filings under our rules for dominant carriers . . . [and] these filings can impede entry, impair competitive pricing, and facilitate collusive conduct." *Id.* at 555 n.1. The Commission concluded: "[W]e believe that the purposes of the Communications Act are best satisfied by reduced entry, exit, and pricing barriers and burdens for nondominant carriers." *Id.* at 579-80. No party petitioned for judicial review of this permissive detariffing rule.[13]

As the FCC anticipated, this regulatory shift helped usher in robust competition in the long distance market. As the Commission found in the *November 25th Report and Order*:

[13] In 1985, the Commission attempted to go still further, specifically to *forbid* nondominant carriers from filing tariffs. *See Sixth Report and Order*, 99 F.C.C.2d 1020 (1985). MCI opposed this mandatory detariffing as inconsistent with the flexibility the FCC's permissive detariffing rules were intended to promote. The D.C. Circuit invalidated mandatory detariffing on the ground that it exceeded the scope of the FCC's modification power under Section 203(b). *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). That court distinguished mandatory detariffing from permissive detariffing, holding that the FCC "fundamentally altered" the tariff policies when it implemented mandatory detariffing. *Id.* at 1190. The court expressly did *not* consider whether the permissive detariffing rule was within the FCC's authority to enact, *id.* at 1190 n.4, and thus the permissive detariffing rule continued unchallenged until 1989, when AT&T filed a complaint against MCI, which also set in motion the proceeding that ultimately led to this appeal.

> The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in furthering the statutory goals of the Comunications Act. In 1982, approximately a dozen long distance carriers operated within the United States. By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers. Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of service, type of services, and selection of carriers.

Pet. App. 30a.

These regulatory changes did not, however, undermine Title II's requirements that rates be reasonable and nondiscriminatory. All carriers remained subject to those statutory commands, and the Commission continued to enforce them—both on its own initiative and in response to complaints from the public. Indeed, after the *Fourth Report and Order*, the large majority of long distance telephone service continued to be provided under tariff. All of AT&T's services, which constitutes approximately two-thirds of the market, were tariffed, as were most of MCI's. MCI provided untariffed service for only a limited number of major corporate customers with which MCI had negotiated individual contracts.

3. AT&T's Challenge to the Permissive Detariffing Policy.

a. AT&T's Original Support For Permissive Detariffing.

AT&T originally defended permissive detariffing before the Commission and in court. *See Sixth Report and Order*, 99 F.C.C.2d at 1027; *MCI Telecommunications Corp. v. FCC*, 799 F.2d 773 (Table) (D.C. Cir. 1986) (No 84-1402) (Br. for Intervenor AT&T Information Systems, Inc. at 40-41). AT&T also testified before Congress that the FCC possessed "ample authority" under Section 203 to lift tariff obligations for all carriers, and that "[r]egulatory burdens . . . , designed for a predivesture world, prevent AT&T from offering customers the lower prices and creative services that its people and its technology could bring."[14] At no time did AT&T petition for review of the FCC's rulemaking orders establishing the permissive detariffing policy.

b. AT&T's Complaint Proceeding.

Despite its prior positions in administrative, judicial and legislative fora, on August 7, 1989, AT&T filed a complaint with the FCC alleging that MCI had violated Section 203 by providing untariffed services to certain large business customers pursuant to the permissive detariffing rules. AT&T sought damages and prospective relief against MCI, but made clear that its principal objection was not to permissive detariffing *per se* but to the FCC's refusal to extend it to AT&T.[15] MCI defended on the ground that it had adhered to the unchallenged permissive detariffing rules set forth in the *Fourth Report and Order*.

On January 28, 1992, the Commission denied AT&T's damages claim,[16] and dismissed AT&T's claims for pro-

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[14] *Long-Distance Competition: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 126 (Sept. 5 & 11, 1985).

[15] *See* Letter from Francine Berry, AT&T, to Donna Searcy, Secretary, Federal Communications Commission (Aug. 7, 1989) ("The Commission's regulatory reforms have not kept pace with the fierce growth of [long distance] competition. Rather than a temporary, transitional measure, the *Competitive Carrier* structure has become a seemingly-permanent imbalance that imposes onerous regulatory requirements uniquely and unfairly on one participant in an intensely competitive market.").

[16] The Commission held that it would be "manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." *In re AT&T* v. *MCI*, 7 FCC Rcd. 807, 809 (1992).

spective relief. The Commission found MCI's conduct to be within the permissive detariffing rules. Thus, AT&T's claim was "in practical effect a challenge to the Commission's previously adopted and effective" rule. The Commission determined that the issue should be addressed in a rulemaking proceeding, because (1) "this rule represents one of the cornerstones of our regulation of the long-distance industry" and (2) "[a]ny change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation." [17]

c. *The Rulemaking Proceeding.*

On the same day it dismissed AT&T's complaint, the Commission instituted a rulemaking to re-examine permissive detariffing in light of AT&T's challenge. *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd. 804 (1992). More than 40 parties, including AT&T, submitted comments in response to the Commission's notice.[18] On November 5, 1992, the Commission reaffirmed

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[17] 7 FCC Rcd. at 809.

[18] Comments filed by users of telecommunications services in *Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13 (comments filed Mar. 30, 1992), demonstrated the value of permissive detariffing to customers. *See, e.g.*, Comments of First Financial Management Corporation, at 2 ("FFMC spends approximately $30 million per year on these services. Because of the unique nature and high volume of FFMC's telecommunications needs, no tariff or combination of tariffs currently on file at the Commission meets FFMC's needs in a cost effective manner. Only a contractual arrangement offers FFMC the customized package of services and flexibility it needs to compete effectively in the information services industry and to continue to offer new and innovative services to its customers on a timely basis."); Comments of International Business Machines Corporation, at 13 ("Interexchange service providers increasingly offer highly customized service options designed to meet the needs of individual users."); Comments of Ad Hoc Telecommunications

the validity of the permissive detariffing rules. On November 25, 1992, the Commission released the text of its formal Report and Order reflecting that action.

In this *November 25th Report and Order*—the rulemaking order at issue here—the Commission recognized that Section 203(a) states that "every carrier" shall file tariffs for common carrier services, but noted that Section 203(b) specifically permits the Commission to "modify any requirement made by . . . this section . . . by general order applicable to special circumstances or conditions." The Commission noted that, with a single exception (for the notice period for modifications), "Congress did not . . . intend to limit . . . [that] power" to modify the requirements of Section 203. *November 25th Report and Order*, Pet. App. 13a-14a.

The Commission also concluded that Congress was fully aware of the permissive detariffing policy for nondominant carriers, and had repeatedly acquiesced in it. The Commission explained that Congress's "recent enactment of the [Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA")] . . . demonstrated its awareness" of permissive detariffing, and that Congress "made no attempt to disturb it." Pet. App. 23a (citing S. Rep. No. 439, 101st Cong., 2d Sess. 3 & n.10 (Aug. 30, 1990)). The Commission noted that in TOCSIA, Congress had expressly imposed tariff requirements for a subset of services provided by nondominant carriers—an action that would have been gratuitous had Congress understood Section 203 as imposing an unwavering tariff requirement. *Id.* at 23a-24a. The Commission also noted that Congress amended Section 203 itself without disturb-

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Users Committee, at 3 (permissive detariffing "has enabled nondominant carriers to respond flexibly to requests for proposals (RFPs), to cost out their responses on a project-specific basis, and to formulate customer-responsive terms and conditions").

ing permissive detariffing for nondominant carriers. *Id.* at 24a.

The Commission also reviewed the rationale for making tariff obligations conditional on possessing market power, and concluded that reversal of this policy would thwart the purposes of the Communications Act because the policy "played a major role in the rapid development of competition and in the consumer benefits that have resulted." Pet. App. 29a. The Commission determined that "but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered the competitive fray at all." *Id.* The Commission also reaffirmed that it continued to possess ample ability to enforce the reasonableness and antidiscrimination provisions of the Communications Act against *all* carriers. *Id.* at 28a.

d. *The D.C. Circuit's Invalidation of Permissive Detariffing.*

While the rulemaking was pending, AT&T petitioned the D.C. Circuit for review of the Commission's decision to dismiss AT&T's administrative complaint against MCI. Both the Commission and MCI argued that the appeals court should not decide the validity of the Commission's permissive detariffing rule, which was under consideration in the separate rulemaking proceeding. After oral argument, but before the panel's decision had issued, the court was informed that the Commission had reaffirmed permissive detariffing and that a formal rulemaking order setting forth the Commission's views would issue shortly. Without waiting for the FCC's rulemaking order, the court issued an opinion on November 13, 1992, invalidating permissive detariffing, and indicating that carriers such as MCI might be liable in damages to AT&T despite compliance with the FCC's policy.

The panel held that the FCC should have decided the legality of the permissive detariffing rule in AT&T's complaint proceeding, rather than deferring consideration to a rulemaking. *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Pet. App. 37a. Instead of remanding, however, the appeals court resolved the statutory interpretation question itself. The panel held that the court's earlier decision invalidating the Commission's mandatory detariffing rule, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); *see* note 13 *supra*, "foreclose[d] the Commission's argument in this case." According to the court, *MCI v. FCC* established that the statutory term "modify" in Section 203(b) authorizes changes only in "incidental or subordinate features." *Id.* (quoting Black's Law Dictionary 905 (5th ed. 1979)). Based on this narrow reading of "modify," the panel concluded that permissive detariffing "exceeds the limited authority granted the Commission in section 203(b)." The court reached this result despite conceding that arguments favoring the legality of permissive detariffing were "not insubstantial when made initially" in 1985, and despite the prior panel's recognition that the permissive detariffing policy had been "fundamentally altered" by the mandatory rule struck down in 1985.[19] Because the panel issued its opinion before the Commission's *November 25th Report and Order* had been released, the views expressed in that rulemaking order did not inform the panel's judgment.

Shortly after the ruling in *AT&T v. MCI*, AT&T sought summary reversal of the *November 25th Report and Order*. On June 4, 1993, the D.C. Circuit complied, on the ground that the prior panel decision in *AT&T v.*

[19] MCI petitioned this Court for review of the D.C. Circuit's 1992 ruling (No. 92-1684). The United States agreed that MCI's petition raised important questions, but suggested that those questions would be better addressed in a case reviewing the *November 25th Report and Order*. *See* Brief for the Federal Respondents in Opposition in No. 92-1684, at 12. MCI's petition in No. 92-1684 was denied.

MCI "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of of the Communications Act." *American Tel. & Tel. Co. v. FCC*, No. 92-1628, slip op. (D.C. Cir. June 4, 1993); Pet. App. 1a, 2a.

MCI petitioned for certiorari from the D.C. Circuit's ruling, as did the United States. On November 29, 1993, this Court granted both petitions.

e. AT&T's Most Recent Statement on Tariff Regulation.

While the petition for certiorari was pending, AT&T asked the FCC to classify it as a nondominant carrier, in effect requesting the benefit of all FCC tariff modifications enjoyed by nondominant carriers.[20] In that petition, AT&T expressed complete agreement with the policy rationales of the *Competitive Carrier* proceeding:

> As the Commission recognized at the outset of this docket, and reaffirmed only months ago, carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably. The pricing of their services is effectively constrained by market forces: if such carriers sought to charge supracompetitive rates, or discriminate unreasonably, customers would simply move to other carriers; and carriers that attempt to charge prices below cost would generate losses that could never be recouped . . . .
>
> [S]uch regulation "imposes barriers and burdens [that] impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs," as the Commission has found. . . . Thus, direct economic regulation is not merely unnecessary; it impedes the "dynamism" of a competitive market and "impose[s] both direct and indirect costs on users." [21]

[20] *See* Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, filed Sept. 22, 1993, in *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket 79-252. A copy of this document has been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

It is common ground that the FCC's permissive detariffing policy for nondominant carriers advanced the core public interest objectives of the Communications Act, 47 U.S.C. § 151, because it brought about more economical and efficient long distance service. The only question presented here is whether this policy is within the Commission's statutory authority.

The D.C. Circuit concluded that the particular statutory commands of Section 203 foreclosed permissive detariffing, and thus shackled the Commission to an obsolete tariff regime that harmed the public interest. Under the controlling principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that decision was wrong.

The FCC's permissive detariffing rule for nondominant carriers is a permissible and reasonable construction of the statutory text. Section 203(b)(2) authorizes the Commission to "modify any requirement" of Section 203. On its face, that statutory phrase authorizes the Commission to modify Section 203's requirement that carriers file tariffs. The ordinary meaning of the word "modify" comfortably encompasses permissive detariffing, and does not limit the Commission to minor or subordinate changes. A nondominant carrier's lack of market power is certainly a "special circumstance or condition" justifying modification. Section 203(c), which sets forth Title II's "filed rate" requirements, plainly contemplates that the Commission may exempt carriers from Section 203's filed rate requirements. Thus, the Commission's interpretation is fully consistent with the particular phrase "modify any

[21] *Id.* at 16-17 (quoting 6 FCC Rcd. at 5895).

requirement," the text of Section 203 read as a whole, and the overall objectives of the Act.

There is simply no basis upon which a court may reject that interpretation. It is implausible to argue that the "plain meaning" of Section 203 forecloses the Commission's interpretation of its modification power. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). To the contrary, deference is especially warranted because Section 203(b) expressly delegates authority to the FCC to decide when modification is appropriate. *See United States v. Morton*, 467 U.S. 822, 834 (1984). The tariff issues involved here are highly technical and at the core of the agency's expertise. *See Chevron*, 467 U.S. at 844; *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). This delegation is consistent with the overall scheme of the Communications Act, which has long been recognized as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). And permissive detariffing directly furthers the goals of economical and efficient telephone service at the core of the Commission's statutory mandate. (Point I).

Congressional ratification dispels any doubt as to the legitimacy of permissive detariffing for nondominant carriers. Congress repeatedly revisited and amended Sections 202-204 of Title II during the 1980s—and specifically amended Section 203—with full awareness of the Commission's permissive detariffing rule. Furthermore, TOCSIA, enacted in 1990, would be rendered nonsensical were the appeals court's interpretation of Section 203 to prevail. (Point II).

Nor is permissive detariffing for nondominant carriers invalid by reason of any supposed inconsistency with a general "filed rate doctrine." No such doctrine exists

apart from the commands of particular statutory schemes, as interpreted and implemented by different expert agencies. Because the Communications Act does not impose an unyielding demand for tariffs irrespective of the wisdom of such a policy, and expressly authorizes the Commission to modify the tariff filing requirement, the *November 25th Report and Order* must be upheld as a permissible exercise of the Commission's authority. (Point III).

ARGUMENT

I. BECAUSE THE COMMISSION'S PERMISSIVE DETARIFFING POLICY FOR NONDOMINANT CARRIERS REPRESENTS A REASONABLE EXERCISE OF THE AUTHORITY DELEGATED BY SECTION 203, THAT POLICY IS ENTITLED TO DEFERENCE.

The Commission promulgated its permissive detariffing rule in an exercise of authority expressly delegated by Congress in Section 203. *See November 25th Report and Order*, Pet. App. 13a-14a. Section 203(b)(2) empowers the Commission to "modify any requirement made by . . . this section either in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). On its face, this language authorizes modification of "any" statutory requirement of Section 203(a), including the "requirement" that carriers file tariffs for all services. The issue, therefore, is whether the Commission's permissive detariffing rule was a proper exercise of its delegated authority to "modify" that requirement.

Chevron controls here. It establishes a "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute that it administers." *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-1402 (1992); *Sullivan v. Everhart*, 494 U.S. 83, 92-93 (1990). Under *Chevron*, if "Congress has directly spoken to the precise question at issue . . . the court, as well as

the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. If Congress has not expressly foreclosed the agency action at issue, courts must defer to the agency's interpretation if its construction of the statute is reasonable. *Id.*

A. The Text of Section 203 Does Not Foreclose the Commission's Interpretation of its Modification Authority.

Reviewing courts may forego *Chevron* deference only if the statutory term at issue "cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart,* 494 U.S. at 92; *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 644 (1990). "If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 292 & n.4 (1988); *see also Good Samaritan Hosp. v. Shalala,* 113 S. Ct. 2151, 2162 (1993); *Bowen v. Yuckert,* 482 U.S. 137, 145 (1987); *Cottage Sav. Ass'n v. Commissioner,* 111 S. Ct. 1503, 1508 (1991). Where, as here, Congress has not merely left an issue open, but has expressly delegated discretion to the agency, deference is at its zenith. *Pauley v. BethEnergy Mines, Inc.,* 111 S. Ct. 2524, 2534 (1991).

It cannot be argued that the "plain meaning" of Section 203 forecloses permissive detariffing. To the contrary, the Commission's interpretation of the scope of its modification authority is entirely consistent with the text of Section 203. The power to modify granted in Section 203 extends to "*any* requirement" established by that section. The requirement that tariffs be filed is not exempted. Nor is the modification power restricted to minor or incidental requirements. "Had Congress intended the narrow construction . . . it could have so indicated." *Smith v. United States,* 113 S. Ct. 2050, 2054 (1993) (declining to read the text "use a firearm" to mean only

"use a firearm as a weapon"); *see also Norfolk & Western Ky. Co. v. American Train Dispatchers Ass'n,* 499 U.S. 117, 129 (1991) (phrase "all other law . . . indicates no limitation"). Congress has not done so, and additional restrictions should not be imposed by this Court. Under the statute's plain meaning, therefore, the Commission's power to modify "any requirement" must encompass the power to modify the requirement that "every . . . carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges." 47 U.S.C. § 203(a).

Thus, this case comes down to whether the permissive detariffing policy is a modification within the meaning of Section 203(b)(2). Because "modify" is not defined in the Communications Act, it should be "construe[d] . . . in accord with its ordinary or natural meaning." *Smith,* 113 S. Ct. at 2054. Webster's Dictionary defines "modify" alternatively to mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." *See* Webster's Ninth New Collegiate Dictionary 763 (1988). Congress thus delegated authority to make changes in the tariff requirements—both "minor" and "fundamental."[22] The latter definition comfortably encompasses the Commission's permissive detariffing rule. The FCC has simply changed a previously unqualified requirement by making it conditional on the existence of specified characteristics—*i.e.,* possessing market power. It is as much a "modification" to change the conditions under which a requirement applies as to change the specific duties imposed when it does apply.

This Court repeatedly has held that "[t]he existence of alternative dictionary definitions . . . each making some

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[22] Indeed, this Court has recognized under the Clean Water Act that the term "modify," the precise statutory term at issue here, "has no plain meaning . . . and is the proper subject of construction" by the agency. *Chemical Mfrs. Ass'n,* 470 U.S. at 126.

sense under the statute, itself indicates that" deference is required so long as the agency's position is consistent with one of the definitions. *Boston & Maine Corp.*, 112 S. Ct. at 1402; *accord Sullivan v. Everhart*, 494 U.S. at 91-92.[23] This is true irrespective of whether the interpretation is "the best or most natural one by grammatical or other standards," *BethEnergy*, 111 S. Ct. at 2537, so long as it is "plausible." *Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 405 (1987). It is especially true where, as here, a statutory term by its very nature confers a *range* of authority. If the agency's interpretation conforms to one common meaning of the term Congress uses, the agency must be understood to be within the range of authority conferred.

The Commission's permissive detariffing policy modifies the requirements of Section 203 just as Section 203 (b)(2) contemplates, "by general order applicable to special circumstances or conditions." 47 U.S.C. § 203 (b)(2). Only when a long distance carrier lacks market power is the statutory requirement set aside. From Congress's perspective in 1934, a long distance carrier's lack of market power would plainly be a special circumstance or condition. Thus, nothing in the text of Section 203 (b)(2) evinces a congressional intent to preclude permissive detariffing.

[23] The instant case is much like *Boston & Maine Corp.* At issue in that case was the meaning of the word "required" in a statute authorizing condemnation of property "required" for Amtrak's operations. The agency interpreted "required" to give it flexible power to exercise condemnation authority. The D.C. Circuit held that the statutory term was unambiguous, and conferred only a narrow condemnation authority in instances where the desired property was "indispensable" to Amtrak's operation. 911 F.2d 743 (D.C. Cir. 1990). This Court applied *Chevron* and reversed. The Court acknowledged that "required" would bear the narrow meaning ascribed by the court of appeals, but found ambiguity because standard dictionary sources contained far broader definitions. This ambiguity was, as the Court made clear, sufficient to require *Chevron* deference.

The Commission's interpretation is fully consistent with the text of Section 203 taken as a whole. If the modification power of Section 203(b)(2) did not extend to the requirements established by Section 203 itself, it would be superfluous. Sections 203(a) and (b)(1) specifically confer on the Commission the power to impose (and modify or remove) *additional* requirement beyond those of the statute itself. If Section 203(b)(2) did *not* confer the power to modify the basic requirements of the statute itself, the provision would serve no purpose beyond that already served by Sections 203(a) and 203(b)(1).[24]

Section 203(c) eliminates any doubt that Congress authorized the Commission to permit untariffed service. That provision expressly states that:

> No carrier, *unless otherwise provided by or under authority of this chapter*, shall engage or participate in such communication unless schedules have been filed and published . . . .

47 U.S.C. § 203(c) (emphasis added). This language makes clear that Congress contemplated that the Commission could excuse carriers from statutory tariff obligations.

The specific "filed rate" requirements set forth in Section 203(c) provide no support for the court of appeals' view that tariffs are mandated whether needed or not. Each of those requirements applies only when the schedules described in the first sentence of Section 203(c)

[24] The last clause of Section 203(b)(2) places a single categorical restriction on the Commission's power to modify "any requirement." The Commission "may not require the notice period specified in paragraph (1) to be more than one hundred twenty days." The statutory construction principle *expressio unius est exclusio alterius* indicates that by limiting the Commission's power in one specific way, Congress intended no other limits. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978); *see also Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2545 (1991) (Scalia, J., dissenting) ("When a provision sets forth a general rule followed by specific exceptions to that rule, one must assume—absent other evidence—that no further exceptions are intended.").

must be filed. Section 203(c)(1) applies to "any such schedule"; Section 203(c)(2) applies to "charges so specified"; Section 203(c)(3) applies to "such schedule." *None* applies, therefore, when the Commission has provided pursuant to Section 203(b)(2) that no schedule need be filed or published.

The Commission's interpretation is also consistent with the overall objectives of the Act, because, as discussed above, permissive detariffing indisputably results in cheaper and more efficient telephone service. That interpretation of Congress's specific grant of authority to modify the requirements of Section 203 should be given the substantial deference generally afforded the Commission's regulatory efforts to advance the public interest objectives of the Communications Act. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

B. Permissive Detariffing is a Permissible Interpretation of Section 203.

Because permissive detariffing for nondominant carriers is a modification within the meaning of Section 203(b)(2), the only question remaining is whether it was a reasonable one. It plainly was, as even the D.C. Circuit conceded.[25] As in *Chevron*, the "interpretation represents a reasonable accommodation of manifestly conflicting interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 U.S. at 865.

[25] Indeed, the D.C. Circuit did "not quarrel" with the FCC's policy objectives. *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992); Pet. App. 57a.

The Commission has studied precisely that question for more than a decade, and the *November 25th Report and Order* plainly reaches a well-reasoned conclusion that permissive detariffing for nondominant carriers affirmatively furthers the substantive policies of Title II. In particular, the Commission has carefully considered whether permissive detariffing of nondominant carriers would undermine enforcement of Title II's substantive prohibitions of unreasonable and discriminatory rates.[26] Based on that analysis, the Commission has concluded that, for carriers without market power, the risk of unreasonable or discriminatory pricing is negligible because market forces will discipline carrier efforts to take advantage of consumers in this way. This reliance on market forces enabled the Commission to resolve a conflict between the overall objectives of the Act, 47 U.S.C. § 151, and the specific regulatory mechanisms of Section 203—a conflict resulting from evolution in the long distance market. *See* pages 6-7, *supra*. *See generally FCC v. WNCN Listeners Guild*, 450 U.S. at 590-93.

AT&T itself *concedes* the correctness of this conclusion, noting that "carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably" because "if such carriers sought to charge supracompetitive rates, or discriminate unreasonably, customers would simply move to other carriers." *AT&T Motion for Reclassification, supra* note 20.

The Commission's predictions on the value of permissive detariffing have been validated by experience. The Commission has concluded that "[a]ctual experience during a decade of permissive detariffing helps confirm that the Commission's permissive detariffing policy has played a substantial role in the development of competition in the interexchange market and the increased choices for cus-

[26] *See Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 456-63, 471-84; *Second Report and Order*, 91 F.C.C.2d at 65-73; *Fourth Report and Order*, 95 F.C.C.2d at 555-62, 577-82.

tomers with respect to carriers and prices." *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd. 1395, 1396 (1993); *see also November 25th Report and Order*, Pet. App. 26a-30a. Nothing in the administrative record casts any doubt on this conclusion, and AT&T has not challenged it.

The Commission's judgment that the substantive mandates of Title II can be adequately enforced under the permissive detariffing regime is precisely the kind of expert judgment that should not be second-guessed by reviewing courts. Because determination of the most effective means of enforcing the Act's substantive standards "necessarily require[s] significant expertise, and entail[s] the exercise of judgment grounded in policy concerns . . . , courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *BethEnergy*, 111 S. Ct. at 2534.

In *BethEnergy*, as here, Congress delegated authority to an agency under its governing statute. And in *BethEnergy*, as here, the underlying statutory scheme, and the resulting regulatory regime, were "complex and highly technical." 111 S. Ct. at 2534. "It is precisely [that] recognition that inform[ed] [this Court's] determination that deference . . . is appropriate." *Id.* This exercise of delegated power under a highly technical statutory and regulatory scheme must be upheld absent compelling indications that it is wrong. *See Chevron*, 467 U.S. at 864-66; *Chemical Mfrs.*, 470 U.S. at 134; *Litton Fin. Printing Div. v. NLRB*, 111 S. Ct. 2215 (1991); *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-82 (1986).

Thus, because the Commission carefully considered precisely the right question and articulated a well-reasoned response to that question, the permissive detariffing policy of the *November 25th Report and Order* must be upheld.

II. CONGRESS HAS RATIFIED THE COMMISSION'S PERMISSIVE DETARIFFING RULE.

Congressional ratification of permissive detariffing further confirms that the Commission has properly exercised its statutory authority.

Congress has long been on notice of the Commission's permissive detariffing policy. During the 1980s, the policy was repeatedly explained in committee testimony and written submissions by the FCC Chairman and Commissioners.[27] When Congress amended Title II in 1990, the

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[27] *See, e.g.*, Letter from Mark Fowler, Chairman, FCC to Sen. Donald Riegle:

> Throughout our Competitive Carrier proceeding, begun in 1980, this Commission, in order to promote competition and lower costs, has taken repeated steps to identify and eliminate unnecessary regulation of certain classes of carriers in the various telecommunications markets. As a result, various unnecessary and costly regulatory burdens have gradually been lifted from non-dominant carriers, including MCI, GTE Sprint, and other similar long distance service providers. Because non-dominant carriers lack market power we have found the filing of rate schedules generally unnecessary and unreasonably burdensome.

131 Cong. Rec. 1533-34 (daily ed. Jan. 31, 1985); *see also Universal Telephone Service Preservation Act of 1988: Joint Hearings on S. 1660 and H. 3621 Before the Senate Comm. on Commerce, Science and Transportation and the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 115 (1983) (Statement of Commissioner Fowler) (explaining the FCC's authority to deregulate non-dominant carriers); *Long Distance Competition: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 105 (1985) (Statement of Commissioner James H. Quello) [hereinafter *Long Distance Competition Hearings*] (detailing permissive detariffing); *Federal Telecommunications Policy Act of 1986: Hearings on S. 2565 Before the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 2d Sess. 89 (1986) (Statement of Commissioner Fowler) (same); Letter from Dennis Patrick, Chairman, FCC, to Rep. John Dingell, Chairman, House Committee on Energy and Commerce, and Rep. Edward Markey, Chairman of Subcommittee on Telecommunications (Dec. 7, 1987) (part of the FCC rulemaking record) (same).

legislative history reflected clear congressional awareness that "[t]he FCC has chosen to 'forbear' from regulating the rates of 'non-dominant' carriers because they do not possess market power and thus have little ability to charge unjust or unreasonable rates in violation of the Communications Act." *See* S. Rep. No. 439, 101st Cong., 2d Sess. 3 n.10 (1990).[28]

AT&T itself repeatedly raised the policy in congressional testimony throughout the 1980s. Though challenging the FCC's refusal to extend permissive detariffing to dominant carriers, AT&T made clear its position that "[t]he FCC has ample authority from the Congress to take the needed action," and urged Commission action to "eliminate the onerous tariff regulations . . . designed for a monopoly age which has passed," and thereby to obviate any need for remedial legislation.[29]

Because Congress has plainly been aware of permissive detariffing for a decade, mere congressional silence would suffice to validate it. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).[30] But here

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[28] This report accompanied enactment of S. 1660, the Telephone Operator Consumer Services Act of 1990 ("TOCSIA"), discussed *infra*. The House Report evinced the similar understanding of the House of Representatives. *See* H.R. Rep. No. 213, 101st Cong., 1st Sess. 3 (1989) ("Since the FCC classifies these . . . providers as 'nondominant' or carriers with market power [sic], the Commission currently does not regulate their rates."); *id.* at 6 ("[T]he FCC has refused to regulate AOS rates because doing so would violate the Commission's long-standing policy of regulating only those companies with market power.").

[29] *Long Distance Competition Hearings*, at 124 (Statement of AT&T Chairman Charles Brown); *id.* at 123, 126, 134. *See also FCC Telephone Price Cap Proposal: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, at 604-05 (1988).

[30] Moreover, Congress acted as an active "watchdog" over the FCC. *See generally* 137 Cong. Rec. S6378 (daily ed. May 22, 1991) (Statement of Sen. Daniel Inouye, Chairman of the Subcommittee on Telecommunications) ("[T]he FCC is constantly

there is much more. Congress specifically amended Section 203 itself in 1989 and 1990,[31] and made other significant changes in Title II in 1988, 1990, and 1993,[32] and never disturbed the FCC's interpretation. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)); *accord Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986); *see United States v. Rutherford*, 442 U.S. 544, 554 (1979); *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981).[33]

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making key policy decisions that fundamentally affect the marketplace. The importance of the FCC and its actions cannot be underestimated. That is why, since 1981, the Congress has enacted legislation to establish authorization levels for the FCC. The Congress views such legislation as a way to increase its oversight of the FCC in the current dynamic environment."). When Congress exercises stringent oversight through annual authorization and appropriations acts, the case for acquiescence is stronger. *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 118-19 (1947); *Brooks v. Dewar*, 313 U.S. 354, 360-61 (1941).

[31] *See, e.g.*, Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Title III § 3002(a), 103 Stat. 2131 (1989) (increasing penalty for violating tariff provisions); FCC Authorization Act of 1990, Pub. L. No. 101-396, § 7, 104 Stat. 850 (1990) (increasing time period for FCC to review tariffs).

[32] *See* FCC Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (1988) (setting deadline for investigation of tariffs); Telephone Operator Consumer Services Improvement Act of 1990, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (to be codified at 47 U.S.C. § 332).

[33] *See also Cottage Sav. Ass'n v. Commissioner*, 111 S. Ct. 1503, 1509 (1991); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-51 (1990); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969).

Furthermore, Congress "affirmatively manifested its acquiescence" by enacting the Telephone Operator Consumer Services Improvement Act of 1991 ("TOCSIA"), 47 U.S.C. § 226, which is premised on the existence of permissive detariffing for nondominant carriers. *See Haig v. Agee*, 453 U.S. 280, 300 (1981) (quoting *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965)).

Concerned by the practices of carriers servicing pay phones, Congress passed TOCSIA to *restore* some tariff regulations of this limited group. *See* 47 U.S.C. § 226 (h)(1)(A) (Supp. III 1991).[34] These nondominant carriers were required to file "informational tariffs" containing some, but not all, of the tariff information generally required by Section 203(a). The legislative history makes clear that Congress took this step because these carriers were " 'non-dominant' " and the FCC "took no action to regulate their rates." S. Rep. No. 439, 101st Cong., 2d Sess. 4 (1990). Congress thus acted to *increase* tariff requirements on a limited set of nondominant carriers based on particular problems associated with those carriers. Had Congress believed Section 203 required complete tariffs for *all* carriers, it surely would not have expressly legislated in a manner that assumed the validity of permissive detariffing and sought to amend it only in a single limited circumstance.[35]

TOCSIA would be rendered wholly superfluous if Section 203 imposed an unyielding mandate that carriers tariff all rates. It would simply make no sense to require a subset of those subject to Section 203 to file "informational tariffs" containing some, but not all, of the information these carriers would otherwise be required to provide by Section 203 itself. In *National R.R. Passenger Corp. v. Boston & Maine Corp.*, this Court made clear that an agency's interpretation should be accepted if it "is consistent with the . . . statutory addition enacted by Congress," and a contrary reading "would make the amendment superfluous." 112 S. Ct. 1394, 1402 (1992); *see also Young v. Community Nutrition Inst.*, 476 U.S. 974, 983-84 (1986); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 746-47 & n.17 (1984). Indeed, if the D.C. Circuit's interpretation of Section 203 were correct, TOCSIA would have perverse consequences. Were the Commission to conclude that "informational tariffs" were no longer necessary under TOCSIA, and exercised the authority in TOCSIA to waive that requirement for carriers serving pay phones, that action would effectively reimpose Section 203's *stricter* tariff requirements on those carriers.[36]

[34] *See* Pub. L. No. 101-435, 104 Stat. 986 (1990) (since FCC "actions ha[d] been insufficient to correct the problems," Congress found that "government regulation [was] required to ensure that competitive operator services are provided in a fair and reasonable manner").

[35] *See FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437-38 (1986); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983); *Bowen v. Yuckert*, 482 U.S. 137, 149-50 (1987); *Heckler v. Turner*, 470 U.S. 184, 208-09 (1985).

III. THE FILED RATE DOCTRINE UNDER THE INTERSTATE COMMERCE ACT DOES NOT CONTROL.

The "filed rate doctrine" arises from particular statutory provisions, and its scope is dictated by the specific statutory scheme governing each utility and agency.[37] For

[36] Section 226(h)(1)(B) grants the FCC the authority to waive the informational tariff filing requirements after four years if the goals of the statute are met. Under AT&T's view of Section 203, if the FCC waived the requirements on operator service providers pursuant to Section 226, those carriers would return to a tariff standard *stricter* than the one the statute allowed to be waived.

[37] In *Consolidated Edison Co. of New York, Inc. v. FERC*, 958 F.2d 429 (D.C. Cir. 1992), the D.C. Circuit upheld the Federal Energy Regulatory Commission's ("FERC") exercise of its statutory authority to modify the requisite waiting period for a rate increase by natural gas suppliers, despite argument by natural gas purchasers that FERC's action was inconsistent with the filed rate doctrine. The court noted that the filed rate doctrine was "[t]ied

this reason, *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), has little to do with the question presented here. *Maislin* does not interpret the Communications Act, does not purport to apply to any agency other than the Interstate Commerce Commission ("ICC"), and in any event, does not address the issue presented here.

Maislin did not consider the scope of the ICC's power to promulgate rules modifying tariff filing requirements under the ICA.[38] Rather, *Maislin* involved the different question whether, absent any modification of the statutory tariff requirement, the ICC could retroactively excuse a carrier that had charged a rate other than a previously tariffed rate for the service at issue. Neither of the two ICC actions under review in *Maislin* relied upon or even cited Section 10762, which empowers the ICC to modify requirements.[39] The Court in *Maislin*

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to" specific sections of the Natural Gas Act, and that "[*s*]*imilar* principles apply 'across the spectrum' of public utility regulation." *Id.* at 431 n.2, 432-33 (emphasis added) (citing *Maislin* as addressing "filed rate doctrine in Interstate Commerce Act context"). *See Reiter v. Cooper*, 113 S. Ct. 1213, 1216, 1219 (1993) ("filed rate doctrine . . . assuredly does not preclude avoidance of the tariff rate . . . through claims and defenses that are specifically accorded by the ICA itself"); *Maislin Industries U.S., Inc. v. Primary Steel Inc.*, 497 U.S. 116, 128-29 (1990); *id.* at 136 (Scalia, J., concurring) ("prior 'filed-rate' decisions . . . were based . . . on the text of the statute"); *Consolidated Edison*, 958 F.2d at 435.

[38] *Maislin* involved an attempt by a carrier's bankruptcy trustee to collect from a shipper the difference between the tariffed rate and the lower rate agreed to by the carrier prior to bankruptcy. The ICC expressly did not modify the tariff requirement, but instead focused on the equitable defenses that a shipper would have to a claim for undercharges, and the ICC's ability to determine "whether the collection of the undercharge in a particular case would constitute an unreasonable practice." *Maislin*, 497 U.S. at 121.

[39] *See NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates I*"); *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989) ("*Negotiated Rates II*").

merely held—over a sharp dissent by Justice Stevens (joined by the Chief Justice)—that the ICC may not approve a carrier's departure from a rate it has *previously* filed for a particular service. *Maislin*, 497 U.S. at 131-33; *id.* at 137-39 (Stevens, J., dissenting).[40] Thus, the issue in *Maislin* differed fundamentally from the issue here.

In any event, the relevant portions of Section 203 of the Communications Act differ in critical respects from their ICA counterparts. As the Second Circuit has observed, Section 203 is in no sense a "carbon copy" of Section 10762. *See American Tel. & Tel. Co. v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974). As the Commission explained, the ICA "analogues to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively." The ICA "analogue to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to 'the requirements of this section [10762].'" The ICC's power to modify tariff requirements thus "does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers 'shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . .'" *November 25th Report and Order*, Pet. App. 17a. *See also Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986)

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[40] The only discussion in *Maislin* of the ICC's modification power under Section 10762(d)(1) occurred in a single footnote, and related only to the first sentence of Section 10762(d)(1) (controlling changes to notice period requirements), and not the second sentence of the section (giving the ICC more general power to modify requirements). *Maislin*, 497 U.S. at 134 n.14. In any event, the Court explicitly declined to address the actions of the ICC under § 10762(d)(1). *See id.* ("We express no view today on the validity of such policies.").

(waiver provision of § 10762(d)(1) cannot be used to nullify § 10761 requirement of a "'rate . . . contained in a tariff'"). Furthermore, the text of Section 203(c) makes quite clear that Congress contemplated exemptions from tariff requirements "under the authority" of Section 203(b), whereas no similar inference can be drawn from the text of the ICA.

Congressional treatment of filed rate requirements under the ICA and the Communications Act has also differed markedly. In *Maislin*, this Court construed the text of the ICA as evidence of Congressional intent to limit the FCC's modification authority, because the ICA exempts *contract* carriers from the requirements of Section 10761(a), thus "'demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.'" *See November 25th Report and Order*, Pet. App. 18a. (quoting *Maislin*, 110 S. Ct. at 2771) (emphasis in original). As demonstrated, an analysis of congressional intent points in precisely the opposite direction here. Congress has repeatedly amended Section 203 of the Act with full awareness of the FCC's permissive detariffing policy, and has plainly ratified that policy. *See* Point II *supra*.

Thus, the FCC's permissive detariffing rule for nondominant carriers is not invalid by reason of some purported inconsistency with a general "filed rate doctrine."

CONCLUSION

The judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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